

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

**MODERN RULES OF PROCEDURE FOR THE
ISSUANCE OF ADVISORY OPINIONS IN
NATURE OF SERVICE PROCEEDINGS**

Docket No. RM2012-4

**APWU INITIAL RESPONSE TO ADVANCE NOTICE OF
PROPOSED RULEMAKING ON MODERN RULES OF PROCEDURE
FOR NATURE OF SERVICE CASES UNDER 39 U.S.C. § 3661**
(June 19, 2012)

In accordance with Order No. 1309, filed April 10, 2012, the American Postal Workers Union, AFL-CIO (APWU) hereby submits these comments in response to the Commission's Advance Notice of Proposed Rulemaking on procedures to govern cases under 39 U.S.C. § 3661.

Introduction

At the outset, we wish to place this matter in context. The procedures followed by the Commission in N cases are in large part mandated by statute. Pressures to change those procedures threaten to make the Commission less effective in fulfilling its statutory duties. The financial crisis faced by the Postal Service was not created by the Commission. Congress has been trying for more than a year to enact legislation to solve problems resulting from with the PAEA and put USPS on better financial footing, but it has been unable to do so. Legislation (S.1789) was introduced in the Senate in early November 2011 and passed the Senate in late April 2012, nearly six months later. The House has not yet scheduled action on a counterpart bill.

It also deserves emphasis that the Commission has not caused any undue delay in three of the four N cases filed in the past 5 years. The current case, Docket No. N2012-1, highlights the importance of a robust review procedure with discovery and rebuttal and also sheds light on how such a process might move a bit quicker. The

Postal Service delayed filing its case for two months beyond its announced plan to file. The Postal Service continued to add relevant and important material to the case well after its initial filing. There were constant revisions – even at this late date. There were numerous late filings notwithstanding the generous amount of time to respond to interrogatories. These Postal Service choices in presenting its case made it impossible for the Commission to act more rapidly. For a detailed listing of such problems see APWU's Complaint in Docket No. C2012-2.

APWU is unconvinced that substantial changes in the Commission's procedures in 3661 cases would be appropriate. The statutory requirement of due process under the Administrative Procedure Act expressly stated in Section 3661 must inform any steps the Commission takes to shorten or restrict the N-case process. Some cases, like N2012-1, are very important and very complex. It will be difficult to substantially shorten the process and permit the Commission to provide well-informed opinions.

Although we believe that a radical departure from the current procedures applied to N-cases is not warranted and would unduly restrict the due process rights of participants guaranteed under Section 3661 of Title 39, there are less drastic changes that could be made that would improve the current process. We submit that the suggested changes detailed below would help to streamline the review process and ensure meaningful and timely Commission advice on Postal Service proposals.

Pre-Filing Briefings Could Permit Tighter Procedural Schedule

The process could be shortened if the Postal Service were to approach the proceeding in a more transparent and cooperative manner. The Postal Service often knows what plan it intends to implement months before filing its request for an advisory opinion with the Commission. For example, in N2012-1, the Postal Service announced in September 2011 that it would file a case with the Commission in October 2011; ultimately the case was filed in December 2011 with an original plan to implement in 90 days. We submit that the Postal Service should brief the Commission and interested parties in advance of its filings. This would allow the Commission and interested parties to begin preparing for the case before it has been filed, thereby ensuring that the time

allotted in the procedural schedule is fully utilized. For example, the first few weeks after an N-case has been filed are often without much activity. Parties must review all the materials, decide whether the issues presented warrant the time and money required to intervene and only then can discovery begin. Were parties to know in advance what was coming, interventions could be filed and discovery could begin as soon as a case is filed.

Additionally, requiring a pre-filing briefing, or perhaps multiple briefings, would allow some issues of concern to be identified in advance. This provides the Postal Service with the opportunity to preempt discovery requests and/or time-consuming discovery disputes by providing the necessary information to address these concerns in its initial filings with the Commission. Furthermore, it can take substantial time for participants to find and contract with experts to develop testimony or models. Beginning the work early could allow earlier introduction of rebuttal testimonies.

Substantial Modification of Proposal Warrants Extending the Schedule

One of the biggest obstacles to timely consideration of Postal Service proposals under Section 3661 is that typically the Postal Service files a case with the Commission and over the next weeks and months continually adds or revises the materials presented. In fact, it appears that in some cases the Postal Service files its request for an advisory opinion on a particular proposal while the proposal is still under development. The result leaves everyone scrambling to understand the revised plan and information and its impacts in an increasingly limited amount of time. For example, the Postal Service proposal in N2012-1 was originally submitted in December 2011, then modified in February 2012 and then revised again in May 2012. See APWU Complaint in Docket No. C2012-2. Substantial revisions to the Postal Service's initial proposal should be the basis for elongating the schedule. Were this rule to be established in advance, the Postal Service would be incented to file its proposal only when it is final. This alone could ensure a reduction in the time needed to fully vet the Postal Service proposal for compliance with the Title 39 before it is implemented.

Discovery Is Critical to an Informed Opinion

The Commission must make factual findings and appropriate recommendations. Recent Advisory Opinions have made factual findings that differed substantially from the “facts” as presented in the Postal Service’s varying filings with the Commission. Vital information obtained through discovery often provides the Commission with the basis for its findings. The expertise of intervenors has repeatedly proven helpful in getting the Postal Service to provide information that the Postal Service did not originally file, or was considered to be irrelevant by the Postal Service. For example, the Postal Service case in Docket N2012-1 is long and complex; it took the Postal Service from December until May to submit its case fully. Important facets of the USPS case were not revealed until the Commission and intervenors uncovered them through discovery. Specifically, discovery questions from the Commission and several intervenors about any exploration or studies of alternatives led to the submission of additional market research by ORC – information APWU thinks will be of value in assessing the risks associated with the Postal Service network rationalization plan – which would never have come to light in a proceeding without discovery. Also, in N2102-1 important implications of the USPS case were not brought out at all by the Postal Service but were only revealed by intervenors through rebuttal. For example, APWU rebuttal witness, Marc Schiller of Shorter Cycles, provided important insights into the significance of the parcel delivery market and raised significant questions about the possibility that the network changes being considered will diminish or eliminate the ability of the Postal Service to compete in the rapidly-growing business-to-consumer parcel market.

The current discovery process, which permits robust discovery of the Postal Service case and critical input from rebuttal witnesses should not be abandoned. There are, however, simple modifications that can be made to the current procedures that would lead to a shortening of the total time allotted for discovery. These modifications are summarized below:

1. Amount of Discovery

Discovery by participants and the Commission should not be unduly restricted, but could be limited in ways that would streamline the process while preserving the due process rights of participants. The proper limitations on discovery require consideration of both the scope and the amount of interrogatories filed.

The rules for governing the scope of discovery should not be revised. Parties should be allowed to conduct full and unfettered discovery against the Postal Service provided the discovery requests are relevant to the Commission's consideration of the Postal Service proposal.

However, when addressing the amount of discovery permitted we encourage the Commission to consider a nuanced approach. Specifically, under the current rules participants must file interventions designating whether they will be full or limited participants. This distinction as currently applied makes no difference as to the level of participation in discovery an intervenor is allowed to undertake. While discovery by limited participants is oftentimes of great value, excess discovery by these participants may contribute to unnecessary delays in the discovery process. Therefore, we submit that while discovery by full participants should be unfettered as to scope and number, discovery by limited participants should be limited with regard to number by applying Rule 33(a)(1) of the Federal Rule Civil Procedure which limits interrogatories to 25, including all discrete parts. Were this limit to be reached parties could seek permission from the Commission to file additional interrogatories. This limitation should not unduly impair the due process rights of limited intervenors and would help to streamline the discovery process.

In order to ensure that all participants do not simply file interventions as full participants in order to engage in unlimited discovery, the Commission should consider revising the definitions of limited and full participants to better describe the level and type of participation allowed or required by each.

2. Answers and Objections to Interrogatories

Under current procedures, responses to interrogatories are required within 14 days of the interrogatories being filed. Oftentimes answers are filed at the deadline. Shortening the time for responses from 14 days to 10 days would help to decrease the time needed for discovery.

Additionally, objections to interrogatories must be filed within 10 days of the interrogatories being filed. Another 14 days is allowed for filing motions to compel answers to these interrogatories. APWU submits that the time for objecting should be reduced to 5 business days and the time for filing motions to compel should be reduced to 10 calendar days.

3. Non-Public Materials

In a typical Section 3661 case, the Postal Service files a large amount of important information under seal, thereby restricting immediate access to this information. This is problematic now, and would be made worse if the Commission were to shorten the procedural schedule applicable to N dockets. The majority of USPS materials that are filed under seal are claimed to contain commercially sensitive information that might harm the Postal Service if disclosed to competitors. While we support the need to protect commercially sensitive information from disclosure to competitors, the Postal Service often files materials under seal that should be public. For example, USPS will generally make files containing finance numbers non-public but many Postal Service files contain finance numbers and the Postal Service has put those files in the public domain. The absence of finance numbers can make matching post office names nearly impossible, since offices often have more than one name or abbreviation. Therefore, the Commission should require something more than the presence of a finance number to permit the restriction of this information.

The Postal Service also tends to make non-public volume numbers below a large geographic area with a claim that release of the information would provide its competitors some advantage. However, UPS and FedEx are routinely provided volume numbers between points A and B because they bid on transportation contracts and

transport a significant amount of mail – including one of the USPS premier competitive products – Priority Mail. In order to ensure that only information that actually poses a commercial harm if disclosed and has not otherwise been disclosed in the public domain is protected, the Commission should reconsider what is required from the Postal Service application for protective conditions. For example, the Commission may require advance in camera inspection of all information to be filed under seal thereby ensuring that protective conditions are warranted.

Furthermore, the process required for intervenors to access non-public information is burdensome and causes unnecessary delays in the examination of the Postal Service proposal. APWU submits that a simplified approach should be considered. Specifically, full participants should be given the opportunity early in the case to file a disclosure statement indicating their competitive interest, if any, in the Postal Service. This disclosure statement would also contain a list of persons that are representatives, consultants or attorneys that will likely seek access to commercially sensitive information of the Postal Service. If this disclosure statement is properly filed, when the Postal Service files a non-public library reference, these participants should be granted access within 24 hours, contingent upon delivery of signed certificates of compliance.

If the Postal Service has specific reasons to want to limit access to a particular participant or individual, or wants a higher showing of proof regarding the protection of its interests, then it must address these issues in its Application for Protective Conditions. Parties would then be given an opportunity to provide a more comprehensive motion for access to these materials, similar to the procedures currently used.

4. Late Filings Should Have Consequences

In Docket N2012-1 the Postal Service has filed approximately 80 motions for late acceptance to date. As the rules currently stand, there are not consequences for untimely filings. In fact, were the Commission to deny any of the Postal Service motions, the record would suffer from the exclusion of late filed responses. Therefore,

the Commission should consider ways to incentivize timely filing of discovery responses and limit late responses. One way to do this would be to extend the discovery schedule in proportion to the lateness of the responses. Knowing this is the consequence, the Postal Service would have an incentive to provide its responses on time. If a discovery request simply cannot be fulfilled in the time allotted under the rules, the Postal Service should be required to file notice explaining a departure from the filing deadline and an estimate of when the response is expected.

The Commission Must Use its Authority

Under current procedures, USPS conducts itself like a litigant in an adversarial proceeding, fighting to protect information from discovery and revealing only what it chooses to reveal or is ordered by the Commission to reveal. If the Postal Service is going to maintain that posture before the Commission, the Commission should be more assertive in exercising its prerogatives. It is noteworthy that the USPS did not produce for N2012-1 a true policy witness. The designated “policy witness” did not purport to exercise managerial authority over the other managers on the USPS task force on network consolidation. He became the able spokesperson for that group, but he did not direct it and he did not set USPS policy. The Commission should demand a true policy witness for every case.

Another example of the Postal Service failing to accord the Commission its due is provided by the June 7, 2012 USPS testimony in response to a Commission Order. The Postal Service witness did not have the technical knowledge or the policy-making authority to respond to the Commission's questions. Examination of the Postal Service's written responses to the Commission's questions posed before the June 7, 2012 hearing reveals that the USPS was more interested in playing litigation games with the Commission than it was in being responsive to the Commission. We respectfully suggest that the Commission would have been justified in using its subpoena power at several points during the N2012-1 process, to speed that process and to ensure that the Commission received necessary information.

A useful contrast is provided by the legislative process. During that process, the Postmaster General testified more than once before relevant congressional committees. It would have been far easier for the Commission to hold the Postal Service accountable, and for the Commission to make difficult decisions, in N2012-1 if the Postmaster General had appeared before the Commission to discuss the difficult questions the Commission must address.

Conclusion

APWU appreciates the opportunity to offer comments on possible changes to the procedures followed in Section 3661 cases. We believe that the suggestions we have offered should help to make the Commission's review process more efficient and its advice more timely, while maintaining the due process rights of participants and the integrity of the process.

Respectfully submitted,

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